

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Biomineral Systems
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Serial No. 88239954
—

Erik M. Pelton of Erik M. Pelton & Associates, PLLC,
for Biomineral Systems.

Alison F. Pollack, Trademark Examining Attorney, Law Office 106,¹
Mary I. Sparrow, Managing Attorney.

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Before Cataldo, Lebow, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Biomineral Systems (“Applicant”) seeks registration on the Principal Register of the mark BIOMINERAL (in standard characters) for goods ultimately described as:

Biostimulants being plant growth stimulants, and plant hormones; Plant growth regulators for agricultural use; Plant hormones, namely phytohormones; Soil conditioners for agricultural purposes; Adjuvants for use with agricultural chemicals; Microbes and enzymes for use in the production of agricultural seeds to enhance plants’ growth therefrom; all of the foregoing for use in activating or deactivating soil bio minerals, all in International Class 1; and

¹ The original Examining Attorney assigned to this application was J. Evan Mucha. The application was reassigned to Examining Attorney Pollack, who assumed responsibility beginning with the Office Action dated May 18, 2021.

Pesticides for agricultural use; acaricide, biocides, germicides, bactericides, virucides, fungicides, insecticides, miticide, nematocide, pesticides, insect repellents, and herbicides; all of the foregoing for use in activating or deactivating soil bio minerals, all in International Class 5.²

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark, as used in connection with the goods indicated above, is merely descriptive of them.

After the refusal was made final, Applicant appealed. The appeal is fully briefed. We affirm the refusal to register.

I. Background

The Examining Attorney initially refused registration of the proposed mark on the ground that, inter alia, it is merely descriptive of the goods.³ The Examining Attorney attached as evidence third-party website use of the phrase "biomineral fertilizers" and the following definition from the Oxford Dictionary:

- Biomineral: an inorganic mineral substance produced by a living organism, typically forming hard supporting structures such as bone, shell, and coral; a biogenic mineral.⁴

² Application Serial No. 88239954 was filed on December 22, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intention to use the mark in commerce.

³ The Examining Attorney also initially refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), concluding that the mark was likely to be confused with a prior registered mark, and later refused registration under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), concluding that the mark was deceptively misdescriptive. However, both of these refusals were subsequently withdrawn. Therefore, we do not address the prosecution history as it pertains to the likelihood of confusion refusal, and only discuss the deceptively misdescriptive refusal to the extent that it is relevant to the issue on appeal.

⁴ March 18, 2019 Office Action at TSDR 58.

Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents

Applicant traversed the refusal.⁵ In response, the Examining Attorney issued a further Office Action that maintained the refusal and requested certain information about the proposed mark,⁶ which Applicant subsequently provided.⁷ The Examining Attorney's questions and Applicant's responses are as follows:

1. What is the significance of the wording "BIOMINERAL" in the mark?
The significance of the wording "BIOMINERAL" in the mark is that it indicative [sic] of the name of the company "BIOMINERAL SYSTEMS".
2. Does the wording "BIOMINERAL" have any significance in the applicant's trade or industry or as applied to applicant's goods? If so, please explain.
No.
3. Is "BIOMINERAL" a "term of art" within applicant's trade or industry? If so, please explain?
No.
4. Do (or will) any of applicant's identified goods contain biominerals, inorganic mineral substances produced by living organisms, biogenic materials, or any other substances commonly referred to as biominerals or bio-minerals? If so, please specify.
No.
5. Are applicant's goods manufactured or produced (or will they be manufactured or produced) using biominerals, inorganic mineral substances produced by living organisms, biogenic materials, or any other substances commonly referred to as biominerals? If so, please explain.
No.⁸

contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁵ September 17, 2019 Response to Office Action, pp. 6-8 at TSDR 6-8.

⁶ October 16, 2019 Office Action at TSDR 7.

⁷ March 16, 2020 Response to Office Action, p 1 at TSDR 13.

⁸ *Id.*

As a result of Applicant's answers, the Examining Attorney concluded that the mark misdescribes an ingredient of the identified goods and consumers would plausibly understand the mark as indicating that the goods contain biominerals. Accordingly, the Examining Attorney issued a new refusal on the ground that the mark was deceptively misdescriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1051(e)(1).⁹

To overcome the deceptively misdescriptive refusal, Applicant amended its identifications to recite: "all of the foregoing for use in activating or deactivating soil bio minerals."¹⁰ In its response accompanying the amendment, Applicant wrote that "[a]lthough Applicant's goods do not include biominerals, the minerals and compounds contained in Applicant's goods are intended to be used in activating and deactivating soil biominerals."¹¹

The Examining Attorney subsequently entered the amendment, withdrew the deceptively misdescriptive refusal and reinstated the merely descriptive refusal, resulting in the present appeal.¹²

II. Mere Descriptiveness – Applicable Law

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of a mark that, when used on or in connection with the applicant's goods or services, is merely descriptive of them. "A term is merely

⁹ April 9, 2020 Office Action at TSDR 3-4, 8.

¹⁰ October 8, 2020 Response to Office Action at TSDR 4-5, 12-13, 22-23.

¹¹ *Id.* at TSDR 22.

¹² November 7, 2020 Office Action at TSDR 2-3.

descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re BayerAG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016).

Descriptiveness is not considered in the abstract; it is analyzed in relation to an applicant’s identified goods or services, the context in which the term is being used, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use or intended use. *BayerAG*, 82 USPQ2d at 1831. “For descriptiveness, [t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411,1413 (Fed. Cir. 2017) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)); see also *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965,128 USPQ2d 1370, 1374 (Fed. Cir. 2018). That a term may have other meanings in different contexts is not controlling on the question of descriptiveness.

In re RiseSmart, Inc., 104 USPQ2d 1931, 1933 (TTAB 2012) (citing *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)).

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018) (quoting *In re Merrill Lynch*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)). These sources may also include websites, publications, and use “[on] labels, packages, or in advertising materials directed to the goods.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 216 (CCPA 1978)).

It is the Examining Attorney’s burden to show, prima facie, that a mark is merely descriptive of Applicant’s goods. *In re Fallon*, 2020 TTAB LEXIS 464, at *23-24 (TTAB 2020). If such a showing is made, the burden of rebuttal shifts to Applicant. *Id.* The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant. *Id.*

The Examining Attorney argues that the term BIOMINERAL immediately conveys to consumers that Applicant provides “products that contain inorganic mineral substances known as biominerals and that Applicant’s products are for use in activating or deactivating soil bio minerals.”¹³

¹³ Examining Attorney’s brief (6 TTABVUE 6).

To support her position, the Examining Attorney points to Applicant's own identification of goods, which recites: "all of the foregoing for use in activating or deactivating soil **bio minerals**" (emphasis added). Additionally, the record shows that Applicant all but conceded that the term was merely descriptive when it explained in its response accompanying the amendment to its identification that "[a]lthough Applicant's goods do not include biominerals, the minerals and compounds contained in Applicant's goods are intended to be used in activating and deactivating soil biominerals."¹⁴

We must, of course, determine whether BIOMINERAL is merely descriptive as applied to the identified goods, not in a vacuum. *In re Classic Media, Inc.*, 78 USPQ2d 1699, *1701 (TTAB 2006). The question whether a mark is merely descriptive is not determined by asking whether one can guess from the mark what the goods are, but rather by asking, when the mark is seen on or in connection with the goods, whether it immediately conveys information about their nature. *Id.* In this instance, Applicant's chosen identification of goods makes clear that Applicant's goods are "all for use in activating or deactivating soil bio minerals." Additionally, in its response accompanying the amendment to its identification, Applicant confirmed that "[a]lthough Applicant's goods do not include biominerals, the minerals and

¹⁴ October 8, 2020 Response to Office Action, p. 11 at TSDR 22. Applicant does not explain why "bio minerals" appears as two words in its identification, nor does it offer any argument that these terms when used together albeit with an intervening space are different from "biominerals" appearing as one word.

compounds contained in Applicant's goods are intended to be used in activating and deactivating soil biominerals."¹⁵

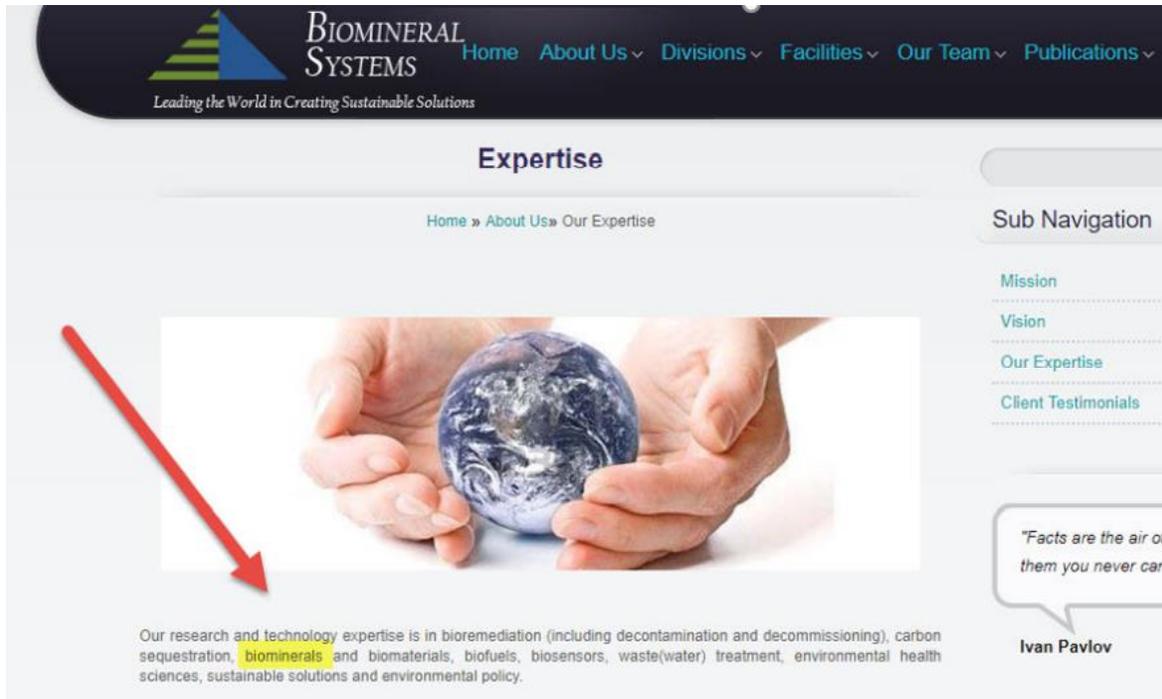
In its brief, Applicant argues that "its products do not **contain** BIOMINERAL[s], as defined by the Oxford Dictionary ...",¹⁶ apparently drawing a distinction between biominerals used as an **ingredient** in its products, as opposed to products whose **purpose or feature** is to act on biominerals in the soil by activating and deactivating them. Applicant's arguments are unpersuasive.

Here, Applicant's use of the proposed mark in the application's recitation of goods itself strongly suggests that the term is merely descriptive, and the descriptive nature is reinforced by the explanatory information that Applicant included in its accompanying response. *See In re Taylor & Francis (Publ'rs) Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (PSYCHOLOGY PRESS & design found merely descriptive of nonfiction books in the field of psychology, in part because the applicant's "identification of goods expressly states that the series of non-fiction books upon which applicant uses its mark are 'in the field of psychology.'"); *In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) ("The term 'yogurt' is concededly the name of the goods. That fact is incontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.").

¹⁵ *Id.* at TSDR 22.

¹⁶ Applicant's brief, p. 25 (4 TTABVUE 26) (emphasis added).

Additionally, the Examining Attorney observes that Applicant's own website indicates that one of Applicant's fields of expertise is "biominerals,"¹⁷ as shown below:



18

Material obtained from an applicant's website is generally acceptable as competent evidence of descriptive use of a proposed mark. *In re Berkeley Lights, Inc.*, 2022 USPQ2d 1000, at *9 (TTAB 2022) (“[The USPTO] commonly looks to an applicant’s website when it is made of record for possible evidence of descriptive use of a proposed mark.”); *In re Promo Ink*, 78 USPQ2d 1301, 1302-03 (TTAB 2006) (examining attorney’s introduction of portions of applicant’s website is permissible in connection with refusal of examination of applicant’s intent-to-use application as merely descriptive). Applicant does not address this evidence in its briefs, apparently

¹⁷ Examining Attorney’s brief (6 TTABVUE 8); October 16, 2019 Office Action at TSDR 65.

¹⁸ October 16, 2019 Office Action at TSDR 65.

conceding the issue. *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

Lastly, the record shows that third-parties use the term BIOMINERAL to describe an ingredient, component, characteristic, feature, function, purpose or use of their agricultural products. For example:

- An article titled, “Application of Organic Liquid Fertilizer Lumbricol in Production of Planting Material From Annual Flowers,” published in the JOURNAL OF INTERNATIONAL SCIENTIFIC PUBLICATIONS (Vol. 4, 2-16), makes several references to “biomineral fertilizer,” such as: “The objective of this research is to study the effect of the **biomineral** fertilizer Lumbricol on the growth and development of annual flowers and determine the optimal concentration for plant treatment.”¹⁹
- An article titled, “Effect of the Biomineral Fertilizer Plantagra on the Growth of Spray-Carnation,” published in the JOURNAL OF MOUNTAIN AGRICULTURE ON THE BALKANS (2015) describes a study that was carried out to determine the “effect of the **biomineral** fertilizer Plantagra in the case of leaf treatment [having certain predetermined] solutions.”²⁰
- Atami – B’cuzz Bloombastic is advertised as a potassium and phosphorous supplement for plants that is “an advanced mix of **biomineral** nutrients and stimulants that increases essential oils and flower weight for higher quality blooms.”²¹
- Bio Nova Soil Supermix, offered by PevGrow (pevgrow.com), is a “**bio-mineral** fertilizer.”²²
- Mills Nutrients (millsnutrients.com) describes itself as “a pioneer in the field of **bio-mineral** plant nutrients, utilizing both synthetic and organic sources to optimize growth rates, yield, flavor and aroma.”²³

¹⁹ March 18, 2019 Office Action at TSDR 59 (emphasis added).

²⁰ *Id.* at 63 (emphasis added).

²¹ April 9, 2020 Office Action at TSDR 112 (emphasis added).

²² November 7, 2020 Office Action at TSDR 55 (emphasis added).

²³ April 9, 2020 Office Action at TSDR 110 (emphasis added).

- Ocean Agro LLC (oceanagrollc.com) offers KHUSHFUL, which is a “specialty **bio-mineral** fertilizer containing plant extracts fortified with nutrients to help plants achieve vigorous growth with faster recovery from stress.”²⁴
- Lordgrow (lordgrow.com) describes its biostimulant as providing “**Biominer**al Nutrition,” which it describes as a natural biostimulant and plant growth enhancer.²⁵ The webpage states, “We are a group of professionals, experienced growers and agriculture experts that have developed the most efficient **biomineral** foliar nutrition solution to naturally feed, boost, and protect your plants.”²⁶ Lordgrow’s Instagram account also contains a post promoting its “**biomineral** fertilizer”.²⁷

Applicant argues that some of the above third-party usage evidence is “irrelevant and should not be considered”²⁸ as it is from “outside the United States.”²⁹ For example, Applicant argues that (1) the article from the JOURNAL OF INTERNATIONAL SCIENTIFIC PUBLICATIONS is from Plovdiv, Bulgaria, and only discusses fertilizer standards in Eastern Europe; (2) the article from the JOURNAL OF MOUNTAIN AGRICULTURE ON THE BALKANS, entitled “Effect of the Biomineral Fertilizer Plantagra on the Growth of Spray-Carnation” is from Bulgaria; (3) Atami - B’cuzz Bloombastic soil supplement emanates from a German company; and (4) Bio Nova Soil Supermix emanates from a company in the Netherlands.³⁰ Applicant argues none of this evidence is relevant to a United States trademark proceeding as descriptiveness must be proven by evidence from the United States and not from international sources.³¹

²⁴ November 7, 2020 Office Action at TSDR 54 (emphasis added).

²⁵ March 18, 2019 at TSDR 64-65 (emphasis added).

²⁶ *Id.* at TSDR 65 (emphasis added).

²⁷ April 9, 2020 Office Action at TSDR 111 (emphasis added).

²⁸ Applicant’s reply brief, p. 5 (7 TTABVUE 6).

²⁹ *Id.*

³⁰ Applicant’s reply brief, pp. 5-6 (7 TTABVUE 6-7).

³¹ *Id.* at p. 7 (7 TTABVUE 8).

Continuing, Applicant argues that “U.S. consumers in need of Applicant’s goods are not likely to be familiar with foreign journal publications in a way that would influence their understanding of Applicant’s mark.”³² Notably, Applicant does not cite to any evidence or caselaw to support its argument.

We disagree. We are cognizant that the probative value, if any, of foreign information sources must be evaluated on a case-by-case basis, *In re Jasmin Larian, LLC*, 2022 TTAB LEXIS 99, *39 (TTAB 2022), and that under appropriate circumstances, the Board may consider web pages posted abroad as evidence of how a term is or will be perceived. In this regard, English language material obtained from foreign websites has been accepted as competent evidence in trademark examination when it is likely that US consumers have been exposed to the website. *See e.g., Bayer AG*, 82 USPQ2d at 1835 (Court asserted that information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.); *Jasmin Larian*, 2022 TTAB LEXIS 99, at 39-40; *In re Remacle*, 66 USPQ2d 1222 (TTAB 2002) (Board found that professionals in certain fields, such as medicine, engineering, computers and telecommunications, would be likely to monitor developments in their fields without regard to national boundaries, and that the internet facilitates such distribution of knowledge, so evidence from an English language web site in Great Britain held admissible). We find the English-language sources summarized above to qualify as such sources, i.e., that consumers and

³² *Id.*

potential consumers interested in developments in fertilizers and other agricultural products may turn to foreign websites when researching fertilizer and agricultural products. Moreover, inasmuch as the Examining Attorney placed copies of these foreign websites into the record during examination, Applicant had an opportunity to demonstrate, if indeed it is the case, that U.S. consumers are not likely to be familiar with such foreign publications; however, that was not done. Accordingly, we find the above summarized evidence to be highly probative. However, we hasten to add that, even if we did not consider the foreign articles at issue, it would not affect the outcome of this case.

Applicant also seeks to discredit the Lordgrow website evidence summarized above, asserting that “[t]his evidence does not exist, as <http://www.lordgrow.com/> is defunct.”³³ However, Applicant’s objection comes after the time for completion of the record, *see* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and Applicant did not submit evidence to support its assertion that the website is no longer in existence, nor did Applicant file a request for remand to submit any such evidence. Without any evidence to the contrary, the Internet printouts submitted by the Examining Attorney demonstrate that the submitted website pages were in existence at the time they were accessed and contained the information shown in the printouts. *See Cai v. Diamond Hong, Inc.*, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Accordingly, to the

³³ Applicant’s reply brief, p. 6 (7 TTABVUE 7).

extent that Applicant's argues that the evidence is "irrelevant and cannot be used to not support the contentions,"³⁴ we disagree.

In sum, we find the evidence of record sufficient to support a finding that Applicant's proposed mark is merely descriptive of its goods, and that it describes a characteristic, purpose or feature of the goods inasmuch as it is "for use in activating or deactivating soil bio minerals".

Applicant argues that its proposed mark is capable of differing meanings, all of which require imagination, thought, or perception, and that, as a result, Applicant's mark is at least suggestive of Applicant's agricultural soil products.³⁵ Specifically, Applicant argues that BIOMINERAL suggests either that (1) Applicant produces and sells agricultural goods that contain bioactivated mineral soil conditioners, pesticides and biostimulants for agricultural use, or (2) Applicant's goods contain natural composite materials such as bones, shells, or rocks, which are created through the process of biomineralization.³⁶ Applicant argues that the existence of these multiple possible understandings of its proposed mark demonstrate that when consumers encounter its proposed mark, they must make a mental leap to understand how it relates to Applicant's goods.³⁷

We disagree. Determining the descriptiveness of a mark is done in relation to an applicant's goods, the context in which the mark is being used, and the possible

³⁴ Applicant's reply brief, p. 6 (7 TTABVUE 7).

³⁵ Applicant's brief, p. 22 (4 TTABVUE 23).

³⁶ *Id.* at p. 23 (4 TTABVUE 24).

³⁷ *Id.* at p. 24 (4 TTABVUE 25).

significance the mark would have to the average purchaser. Descriptiveness of a mark is not considered in the abstract. In the context of agricultural products, such as those set out in Applicant's identification, consumers, i.e., growers, would understand the mark to describe a characteristic, purpose, or feature of Applicant's goods.

In sum, the evidence of record supports a finding that the proposed mark is merely descriptive of a characteristic, purpose or feature of Applicant's goods and that relevant consumers would perceive the term as merely descriptive thereof.

III. Decision

The refusal to register Applicant's mark is affirmed.